Alfred E. Ramey v. U.S. General Accounting Office

Docket No. 01-703-17-81

Date of Decision: May 12, 1982

Cite as: Ramey v. GAO (5/12/82)

Before: Gallas (Chair), Bussey, Simmelkjaer, and Taylor, Members

Attorney Fees

FINAL BOARD DECISION ON PETITIONER'S MOTION FOR ATTORNEY'S FEES

Background

This Board initially denied Petitioner's request for attorney's fees on March 9, 1982. That denial was mailed to the parties on March 11, 1982. Counsel for Petitioner renewed the request by motion filed on April 1, 1982. Respondent submitted a brief and exhibits in opposition on April 21, 1982, including a request for a hearing in advance of a decision if the Board agreed to accept Petitioner's renewed request of April 1, 1982.

Contentions of the Parties

Petitioner contends that since his within-in grade salary increase was granted by the Board and neither party appealed that determination, "he has prevailed insofar as the retaliation aspects of this case are concerned." In this connection, Petitioner also asserts that approximately 75% of counsel's time pertained to this issue. Next, Petitioner argues that an award of attorney's fees is warranted in the interest of justice because the action complained of was a vicious and retaliatory action on the part of Petitioner's supervisors. Further, Petitioner contends that the Respondent was unable to produce any evidence at the hearing to support this action. Finally in this regard, Petitioner concludes that the proper statutory basis for determining this issue is under 5 U.S.C. §7701(g)(2), not section 7701(g)(1). Subsection (g)(2) requires application of the less stringent evidentiary standard prescribed in section 706(k) of the Civil Rights Act of 1964, as amended. Subsection (g)(1), the standard cited by this Board in its initial ruling on the question of attorney's fees, is a stricter standard. Nevertheless, Petitioner alleges that he satisfies either statutory standard here. Lastly, Petitioner contends that reasonable attorney's fees in this case amount to $28,557.45, computed at the rate of $100.0 per hour and including a 60% incentive award. Documentation has been supplied in an effort to substantiate these various assertions.

The Respondent cites a number of arguments in opposition to Petitioner's request. First, Respondent contends that the reopening and reconsideration standards of 4 C.F.R. §28.25(c) have not been met here. Second, Respondent argues that the Board's initial ruling of March 9, 1982, on attorney's fees was a final decision under 4 C.F.R. §28.21(m) and cannot be reconsidered. Third, Respondent asserts that Petitioner is not a prevailing party and hence attorney's fees cannot be awarded. Next, it is contended that an award of attorney's fees is not warranted in the interest of justice under the MSPB administrative ruling interpreting 5 U.S.C. §7701(g)(1). The Respondent then argues that Petitioner's attorney's fees and costs are not reasonable, as required by 5 U.S.C. §7701(g)(1). In this regard, Respondent claims that a $35 to $60 per hour rate would be far more reasonable than the $100.00 per hour rate asserted by Petitioner. The

Respondent also requests that the Board grant a hearing on this issue of attorney's fees if the Board intends to award such fees. Lastly, the Respondent states that the award of a bonus multiplier for the contingency factor in this case is entirely inappropriate.

Analysis

In our initial ruling, the Board discussed the basis for an award of attorney's fees under 5 U.S.C. §7701(g), the applicable standard for Board decisions. While paragraph (2) of the subsection (g) sets forth a different standard for decisions based upon a finding of discrimination, absent such a specific finding, the general standard of paragraph (1) of subsection (g) governs the award of attorney's fees in Board cases. As we noted at page two of that earlier ruling, before attorney's fees can be awarded, three conditions must be met:

(1) The Petitioner must be the prevailing party;

(2) The award of attorney's fees must be "warranted in the interest of justice"; and

(3) The fees awarded must be reasonable.

Certain Merit Systems Protection Board (MSPB) decisions applying these criteria were then cited. Further, the Board included a list of seven items which must be included in support of such a request for attorney's fees. Finally, the Board summarized the requirements for submission of a request for attorney's fees at page four:

"These three criteria: Compliance with 5 U.S.C. §7701(g); a memorandum in support of the request for attorney fees; and the supporting documentation constitute the minimum requirements for submission of a request for the award of attorney's fees to the Personnel Appeals Board in this case. The referenced criteria may be modified by the Board as future cases so dictate."

With regard to the case at bar, the Board denied Petitioner's request for attorney's fees. However, the Board did not foreclose resubmission of that request, particularly since this was a matter of first impression and this case presented the Board with the first opportunity to adopt appropriate criteria for the submission and evaluation of such requests. Accordingly, we stated at pages two and three of the earlier ruling that:

"Before this Board will consider any request for the award of attorney's fees, it is necessary for the Petitioner to initially satisfy the statutory requirement of 5 U.S.C. §7701(g) and the criteria set forth in the above-referenced cases. Additionally, in submitting such a request, it is incumbent upon the Petitioner's counsel to present it in the form of a memorandum. That document should set forth why the award of attorney's fees is appropriate in this case..."

It is clear from the above-cited language and the administrative notice of March 11 that the Board's ruling of March 9 was not a final decision. Hence, the Board's ruling of March 9, 1982, was not to be considered a final decision within the meaning of 4 C.F.R. §28.21(m) unless Petitioner elected not to make resubmission within this time frame.

A review of Petitioner's resubmission dated April 1, 1982, evidences compliance with the documentation requirements for submission of a request for attorney's fees. Moreover, the resubmission was within the allotted time frame. Similarly, the GAO response was also timely filed.

Nevertheless, before proceeding to the merits of Petitioner's request, it is necessary to first dispose of certain procedural issues raised by Respondent.

Respondent first contends that the Board should not reconsider Petitioner's request because he has not complied with 4 C.F.R. §28.25(c)(1). Reliance on this provision is misplaced since a "decision" by the Board on attorney's fees is a final decision under §28.21(m), which is subject to judicial review under §28.27 of the Board's regulations. Therefore, the reopening and reconsideration provisions of section 28.25(c) do not apply to a request and Board decision on attorney's fees.

Second, Respondent asserts that the Board's ruling of March 9, 1982, was a final decision under section 28.21(m) and hence the Board is without jurisdiction to consider the matter. However, as noted above, the March 9 ruling was not a final decision and for the reasons noted therein, Petitioner was given the opportunity to resubmit his request.

The Respondent also contends that since Petitioner filed an action in the United States District Court on the underlying cause of action which also seeks attorney's fees, a decision by this Board on that issue would preempt the Court's jurisdiction. The case of Public Service Commission of New York v. Federal Power Commission, 285 F.2d 199 (D.C. Cir. 1960), is then cited in support of this proposition. Reliance on the referenced case is misplaced here. In that case, a State agency sought review of a Federal Power Commission (FPC) order denying the State agency standing to intervene in proceedings before the FPC under the Natural Gas Act. Although the State agency sought judicial review of the FPC ruling denying intervention, the FPC simultaneously considered and decided the merits of the underlying proceeding. In concluding that the actions of the FPC could not render moot judicial review of the State agency petition to the Court, the D.C. Circuit observed:

"If a person has applied for intervention in a proceeding and been denied intervention, and has validly brought the order of denial to this court for review, the administrative agency cannot destroy the jurisdiction of this court by simply taking final action in the proceeding, the would-be intervenor being absent from that proceeding. Such a holding would create too ready a means by which the administrative agencies could thwart the power of a reviewing court to pass upon the validity of orders denying intervention. Such applicants for intervention have a right to judicial review of such denials."

The Petitioner's request for attorney's fees for the administrative phase of his case was filed independently of his petition for judicial review of the Board's original panel decision denying relief on his claim of discrimination; the latter action having been properly filed pursuant to the applicable statutory and regulatory requirements. Moreover, in the proceeding presently pending before the U.S. District Court, Petitioner is seeking the award of attorney's fees for the judicial phase of his case. Furthermore, the Petitioner elected to resubmit his request for attorney's fees for the administrative phase of his case to this Board, not the U.S. District Court. Finally, once issued, the Board's decision will become final and be subject to review by the same U.S. District Court. Hence, the Board has not preempted the jurisdiction of the U.S. District Court.

Equally important, numerous Federal courts have considered whether administrative agencies have the authority to award attorney's fees to the prevailing party at the administrative level. Usually citing Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975), as authority, these cases have uniformly held that where Congress has specifically authorized it by statute, an administrative proceeding may award attorney's fees to the prevailing party. See Porter v. District of Columbia, 502 F.Supp. 271 (D.D.C. 1980); Watson v. United States Veterans Administration, 88 F.R.D. 267 (C.D.Calif. 1980); Patton v. Andrus, 459 F. Supp. 1189 (D.D.C. 1978); Williams v. Boorstin, 451 F. Supp. 1117 (D.D.C. 1978); Smith v. Califano, 446 F. Supp. 530 (D.D.C. 1978) and Fischer v. U.S. Department of Transportation, 430 F. Supp. 1349 (D.Mass. 1977). Since this Board was given such specific authorization in 31 U.S.C. §52-3(m), directing the Board to promulgate regulations consistent with the principles of 5 U.S.C. §§7701-7702, the Board is empowered to award those fees if the requirements of 5 U.S.C. §7701(g) are met. This authority is, of course, limited to the administrative proceeding. Hence, the filing of a petition for judicial review of the underlying Board decision -- as occurred in this case -- does not usurp the Board's statutory and regulatory responsibility to decide this issue.

The Respondent also requests that the Board conduct an evidentiary hearing before making a specific award of attorney's fees in favor of Petitioner, subject to discovery in advance of that hearing. The Board's regulations make no provision for such a hearing or prehearing discovery in §28.21(m). Moreover, Respondent has provided no exceptional or unusual circumstances which would justify such an extraordinary request under the existing Board procedures. Lastly, the issue here has been thoroughly briefed and documented by both sides. For these reasons, the Respondent's requests for additional discovery and a hearing must be rejected.

One additional procedural issue must be addressed before considering the merits of Petitioner's claim. In his resubmission, Petitioner contends that the applicable standard for the award of attorney's fees in his case is 5 U.S.C. §7701(g)(2), not 5 U.S.C. §7701(g)(1). In support of this position he states that the Panel's original ruling in Ramey v. GAO, (October 19, 1981) included a finding that Respondent's denial of Petitioner's within-grade salary increase was in retaliation for Petitioner's filing of a complaint of discrimination. Respondent disputes this, contending that the panel merely determined that there was not substantial evidence to support Respondent's denial of that within-grade salary increase.

"§7701(g)(2) states in pertinent part:
If an employee .. is the prevailing party and the decision is based on a finding of discrimination prohibited under §2302(b)(2) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under §706(k) of the Civil Rights Act of 1964 ..."

For this provision to be applicable here, Petitioner must have prevailed and the decision must have been based upon a finding of discrimination. A review of the Panel's decision of October 19, 1981, indicated the panel granted Petitioner's request that he be granted his within-grade salary increase retroactively. However, the panel was unable to find sufficient evidence that the denial was in retaliation for Petitioner's filing of a complaint of discrimination, merely that this might have been a contributing factor. It did conclude that the grounds relied upon by Respondent to deny that salary increase were not sufficient. Based upon the evidence presented, however, no specific finding of discrimination prohibited under 5 U.S.C. §2301(b)(2) was made in the panel decision of October 19, 1981. Accordingly, the standards of subsection 7701(g)(2) are inapplicable to this case; the standards of subsection 7701(g)(1) apply.

Having disposed of these preliminary matters, we now evaluate Petitioner's request on its merits.

First, Petitioner must be the prevailing party. Petitioner argues that he did prevail on the issue of the denial of his within-grade salary increase. Respondent asserts that Petitioner's resubmission failed to set forth a rationale or authority for making that determination. The panel decision of October 19, 1981, was in favor of the Petitioner on his request for a retroactive within-grade salary increase, though not on the grounds suggested by Petitioner. Nevertheless, Petitioner did prevail on this issue within the meaning of 5 U.S.C. §7701 (g)(1). See Allen v. Postal Service, 80 FMSR 7015 (July 22, 1980); O'Donnell v. Department of the Interior, 80 FMSR 7016 (July 22, 1980); and Kling v. Department of Justice, 80 FMSR 7018 (July 22, 1980). The proper test to be applied here is not whether the theories relied upon by the Petitioner were adopted as part of the decision, but whether the Petitioner prevailed on the issue itself.

We now turn to the second issue: Is an award of attorney's fees warranted in the interest of justice? In Allen v. Postal, supra, the MSPB cited five examples of circumstances which would meet this test. Although those examples were merely intended to be illustrative of circumstances justifying the award of reasonable attorney's fees to a prevailing party, they provide a proper framework for deciding this case. The panel decision of October 19, 1981, did not include any findings satisfying examples: (1) cases in which the agency engaged in a prohibited personnel practice; (3) cases where the agency initiated the action against the employee in bad faith; or (4) cases where the agency committed a gross procedural error which prolonged the proceeding or severely prejudiced the employee. Nor do we believe example (5), cases where the agency knew or should have known it could not prevail on the merits when it took the action, is applicable here; that is, our reading of the panel decision and the submissions of the parties does not indicate that this example is pertinent to this case.

What remains is example (2), cases where the action was clearly without merit, or was wholly unfounded, or the employee was substantially innocent of the charges. In light of Petitioner's relationship with his immediate supervisor, as reflected in the record of this case, we cannot conclude that the denial of Petitioner's within-grade salary increase was an action "clearly without merit." Actually, the panel decision essentially determined that there was not substantial evidence to support that action. Similarly, the panel decision did not include a determination that the action was wholly unfounded, but rather was not supported by sufficient evidence. However, our reading of the panel decision does persuade the Board that Petitioner was substantially innocent of the grounds relied upon to deny the salary increase. Specifically, we refer to the Panel's findings at pages 16-17 of the October 19, 1981 decision that:

(1) Petitioner was not counseled by his first-level supervisor until 10 months after his selection as Petitioner's supervisor;

(2) Petitioner was given a satisfactory performance appraisal, but barely six weeks later the same supervisor initiated a counseling session with Petitioner;

(3) Petitioner's previous supervisors consistently found his performance to be satisfactory or better;

(4) The timing of the initial counseling session was suspicious;

(5) The evidence did not establish that Petitioner's ADP group was responsible for the delays in completing the HUD audit;

(6) The testimonial evidence did not corroborate Respondent's allegations regarding certain HUD audit meetings which occurred in 1981;

(7) Petitioner established that the target date for completion of his portion of the HUD audit was much later than his first level supervisor alleged; and

(8) Petitioner was not the source of Respondent's HUD audit problems.

As the MSPB observed in footnote 35 to its decision in Allen v. United States Postal Service, supra, regarding this "substantially innocent" standard:

"In making such determination, the presiding official should examine the degree of fault on the employee's part and the existence of any reasonable basis for the agency's action."

Here, the Board's review of the administrative record does not establish the existence of a reasonable basis for Respondent's denial of the salary increase, and the degree of fault on Petitioner's part is minimal at best. Therefore, we find Petitioner to be "substantially innocent" of the charges. Hence, the award of attorney's fees would be in the interest of justice here.

The remaining issue is: What constitutes reasonable attorney's fees in this case? As Respondent correctly observes in its brief of April 21, 1982, the Board must limit the award to a reasonable amount, the basis for which must be articulated as part of that award. The leading MSPB decision in this issue (included as Exhibit C to the Respondent's April 21 submission) is Kling v. Department of Justice, supra, which cites two factors as being essential to a determination of the reasonable fee to be awarded: identification of the pertinent factors to be weighed and a rational analysis of those factors. The case of Johnson v. Georgia Highway Express, Inc., 480 F.2d 714 (5th Cir. 1973) is cited as the source of the pertinent factors. Indeed, these factors are listed in footnote 6 of the Kling decision. With regard to the analytical framework within which to evaluate these factors, the Kling decision relied on a second line of decisions, the leading case for which is Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973). In essence, this second line of decisions states that the proper approach is to: determine the customary hourly rate of counsel; the number of hours expended in the case by counsel; multiply these two factors; and adjust this result in light of the factors set forth in Johnson v. Georgia Highway Express, Inc., supra. However, the MSPB added a most appropriate set of caveats to this analytical framework:

"We caution, however, that the presiding official must scrutinize with due care the hours and the billing rates claimed by counsel in supporting their motions for attorney fees. The presiding official may cut hours for duplication, padding, or frivolous claims, and impose fair standards of efficiency and economy of time. Such evaluation obviously requires adequate information as to the way in which counsel's time was spent (discovery, legal research, interviewing witnesses, appearance at a hearing, preparation of motions or briefs, etc.). Billing rates should be evaluated according to the individual attorney's professional standing, experience, status (general partner, junior partner, associate), and specialized expertise. The presiding official must include in the addendum decision findings adequate to substantiate the determination of the appropriate billing rates and compensable hours. Any adjustment to the amount derived from multiplying the hourly rate by the number of compensable hours should also be identified in the addendum decision and the basis carefully explained. In this regard, we note that the purpose of §7701(g)(1) is to assure that legal expense is not a barrier to the representation of employees and applicants for employment who have just cause for appeal. Accordingly, a public policy "bonus multiplier" for counsel is not justified in a Board award of attorney fees in an employee appeals case. It

may nevertheless be appropriate, when counsel's compensation is contingent on success, to adjust the award upward to compensate for the risk the attorney is accepting of not being paid at all."

In support of Petitioner's request for reasonable attorney's fees, counsel has submitted time sheets, semi-monthly billing statements, a calculation of fees, resumes and a retainer letter. We begin with an examination of the time sheets. A typed summary of the time sheets is reproduced as Appendix A to this decision. Additionally, the time expended has been divided into five logical categories, consistent with the descriptions given by Petitioner's counsel on each time sheet:

(1) Preparation and discovery,

(2) Fees petition and research,

(3) Hearing,

(4) USDC, and

(5) Drafting after hearing.

The total hours expended in each category were then cross-checked against the calculations made by counsel and included as Exhibit A to Petitioner's resubmission.

In reviewing the individual time sheets, a number of discrepancies were noted. For example, counsel appears to have charged twice for the same work on January 13 and January 15, 1982 (see page 5 of Exhibit B). Also, counsel for Petitioner shows the total number of hours expended to be 287 on page 6 of Exhibit 8, yet the total number of hours shown on Exhibit A is only 223.5. Additionally, many entries on the time sheets are partially or totally illegible. Nor is it possible by reviewing these time sheets to determine what portion, if any, of each day's work was allotted to the denial of Petitioner's within-grade salary increase -- the only issue on which Petitioner prevailed. Accordingly, in evaluating the Petitioner's submissions, there is no direct correlation between the total hours alleged to have been expended on this issue and the time sheets submitted in support of the hours so expended.

This necessitated an evaluation of the time sheets by each of the five categories established by the Board in reviewing the time sheets. What follows is an evaluation by each of these categories.

The first category, which we labeled as preparation and discovery, includes the following activities: conferences with Petitioner, conferences with others, telephone calls to or from Petitioner, telephone calls to or from others, preparation of documents, review of documents, preparation for the hearing and pre-hearing discovery. Petitioner did not learn of the denial of his salary increase until July 7, 1981, during the first day of his four-day hearing. Two days later, Petitioner filed an amended complaint of discrimination to include this issue. Therefore, all hours expended prior to July 7, 1981, have been excluded. Furthermore, July 7, 1981, was excluded since it falls into category three. Thus, no less than 34.25 hours have been subtracted from the first category. In addition, the Board excluded the 33.75 hours listed for consultation with other attorneys in light of counsel's representation to the Board that he is an accomplished and experienced specialist in this area of the law. This leaves a net of 64.0 hours in the first category. However, counsel for Petitioner has not made a persuasive showing that 75% of his time was devoted to the issue on which his client prevailed. Assuming a reasonable equal division of labor between the two issues presented in this case, the Board considers only one-half, or a total of 32 hours, to be

justified here.

The second category consists of time spent on the motion for attorney's fees. Although counsel has claimed 36.5 hours, a review of the time sheets shows only 28.5 hours. The Board considers the preparation and filing of a request for attorney's fees to be a routine matter, particularly for an attorney representing himself as an experienced specialist in this area of the law. Therefore, the Board reduced the number of hours to one-half of the total hours claimed, or 14.25 hours.

The only category in which the total hours claimed coincides with the Board's total is category three, the hearing phase. Since the denial of the salary increase issue was not discovered until a good portion of that day's hearing had been completed, the 8.5 hours for the hearing have been subtracted for July 7, 1981. This leaves 31.0 hours. Our review of the hearing transcripts indicates that not more than one-half of the remaining three hearing days was devoted to this issue. Thus, we have allowed only one-half, or 15.5 hours in this category.

The fourth category, labeled "USDC", refers to the civil action filed by Petitioner regarding the other issue in the original panel decision of October 19, 1981. For that reason, we have excluded all 27.0 hours charged to this category.

The final category is post-hearing drafting by counsel. This encompasses preparation of the Closing Argument, including research and conferences between the Petitioner and his counsel. As in other categories, consultation time with other attorneys has been excluded because of counsel's representations that he is an experienced specialist in this area of the law. Thus, only one-half, or 1.25 hours has been credited for the entry on August 5, 1981. Consultations of 2.0 hours on August 7, 1981; 4.0 hours on August 17, 1981; 4.0 hours on December 1-2, 1981; and 12.0 and 8.0 hours, respectively, under "Entire Case" entries for consultations have been excluded. Similarly, 2.5 hours on December 1, 1981, for "Call Sampson" has been excluded. Entries on January 13-14, 1982, entitled "Petition Preparation Review and Edit" have been excluded since the same entries have been repeated and credited under category two. Additionally, 2.0 hours on September 22, 1981, have been excluded because the entries are illegible. This resulted in 49.75 net hours being credited under category five. However, since only approximately one-third of the Closing Argument relates to the salary increase issue, counsel has only been credited with 16.5 hours, or a third of the total net hours, absent more definitive and descriptive time sheets. As a consequence, Petitioner's counsel has been credited with a total of 78.25 billable hours for all five categories.

An additional $151.00 in expenses incurred has also been requested (see Petitioner's Exhibit B-7). As the MSPB noted in O'Donnell v. Department of the Interior, supra:

"Attorney fees may properly include reimbursement for counsel's out-of-pocket disbursements ... However, such reimbursable expenses are limited to those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services. Such recoverable expenses include reasonable photocopying, paralegal expenses, travel and telephone costs, and necessary supplemental secretarial costs.
* * *
Other costs, however, incurred or paid to a third person, not to appellant's attorney or to the organization which pays the attorney's salary, cannot reasonably be considered in awarding attorney fees. These non-recoverable costs include witness fees and expenses, investigation expenses, deposition expenses, and the cost of charts and maps."

Applying these standards to counsel's submissions, we exclude $13.00 for July 7, 1981, since it preceded introduction of the salary increase issue as noted above. The relevance and purpose of the entries for July 27-31, 1981, are not clear, except for three days of parking at the rate of $3.50 per day, or $10.50. Therefore, only the $10.50 has been included. Five additional days parking at the rate of $3.50 per day has been included, or $17.50. Postage and photocopying of $20.00 has been included. The total identifiable out-of-pocket expenses is thus $48.00. In the absence of a more explicit explanation for these expenses, the Board has only allotted one-half of this sum - $24.00 - consistent with our presumption that the expenses should be allocated equally between the two issues presented in this case.

We must next determine the appropriate hourly billing rate for Petitioner's counsel. The submissions of Petitioner assert that $100.00 per hour, the customary hourly rate for his counsel, should be approved here. We note, however, that the retainer letter (see Attachment A-1 to Petitioner's submission of April 1, 1982) reflects two billing rates: $100.00 per hour if the Petitioner prevails in his claims of discrimination or $50.00 per hour "in the event client does not substantially prevail, within the meaning of the Civil Rights Act of 1964." Additionally, counsel for Petitioner asserts that he should be awarded a 60% contingency and incentive award - also at $100.00 per hour - "because of the time delay in payment and because 50% of the fee at attorney's regular rate is contingent upon 'substantially prevailing.'" (See Exhibit A to Petitioner's submission of April 1, 1982.) However, counsel did not include a compendium of recent fee awards in personnel cases decided within the District of Columbia or other objective evidence by which the Board could determine the prevailing hourly rate awarded by Federal courts in this geographic area.

By contrast, Respondent submitted a compendium of recent fee awards by the U.S. District Court for the District of Columbia and the Court of Appeals for the D.C. Circuit. The fee awards cited range from $30.00 to $148.28 per hour for Government personnel cases. In addition, the Board takes judicial notice of the fee schedule established by the U.S. Department of Justice for the payment of private counsel hired to represent Government officers and employees. According to John Sibert, Assistant Director, Federal Program Branch, Civil Division, U.S. Department of Justice, the present standard hourly rate approved for private counsel is $75.00. Also instructive in this regard is an article by David Lloyd entitled, "Presenting Claims for Attorneys' Fees in the District," appearing in the official publication of the District of Columbia Bar, 6 District Lawyer 36, 40 (March/April 1982), showing a representative rate of $75.00 to $125.00 per hour in civil rights cases within the District of Columbia.

In light of the range of hourly rates presently approved by Federal courts within the District of Columbia, the limits set forth in the retainer letter executed by Petitioner and his counsel, and the rate approved by the U.S. Department of Justice for outside counsel, the appropriate hourly rate in this case is $40.00 to $100.00. To determine the reasonable hourly rate to be awarded to Petitioner's counsel, the Board must evaluate the submissions of the parties in light of the 12 factors set forth in Johnson v. Georgia Highway Express, Inc., supra:

(1) Time and labor required,

(2) Novelty and difficulty of issues,

(3) Skill requisite to perform the legal service properly,

(4) The preclusion of other employment due to acceptance of the case,

(5) The customary fee for similar work in the community,

(6) Whether there is a fixed or contingency fee,

(7) Time limitations imposed by the client or circumstances,

(8) Amount involved and result,

(9) The experience, reputation and ability of the attorney,

(10) The undesirability of the case,

(11) The nature and length of the professional relationship with the client, and

(12) Awards in similar cases.

Factor (1) has already been used to reduce the number of billable hours, which we found to be excessive, to 78.25 hours. In our view, the issue of Petitioner's salary increase was not novel, nor was it exceedingly difficult based on our review of the entire administrative record in this case. As to factor (3), there is no evidence that Petitioner's counsel demonstrated or even needed to possess exceptional skills to properly represent Petitioner on this issue. We have no evidence as to the fourth factor. The customary fee for such work in the community, based upon the samples provided, is approximately $75.00 per hour, the same rate recognized by the U.S. Department of Justice for outside counsel. The retainer letter indicated a fixed fee of $50.00 per hour, with a contingency fee of an additional $50.00 per hour in the event that Petitioner substantially prevailed on this issue "within the meaning of the Civil Rights Act;" however, Petitioner did not prevail on the basis of this Act, but rather the general evidentiary standard applicable to a performance-based action such as denial of a within-grade salary increase. No unusual time limitations were present in this case. Concerning factor (8), the amount of damages was minimal - a few hundred dollars per year for a step increase - and we attach no particular significance to the result achieved by Petitioner on this issue. Factor (9) is somewhat difficult to quantify since the Board's only knowledge of the experience and reputation of counsel is based upon self-serving representations; further, no exceptional skills and abilities were demonstrated by counsel in the handling of this issue. Factor (10) is not applicable to this case, particularly since no adverse publicity surrounded this case. As to factor (11), this appears to be a professional relationship limited to the representation of the Petitioner on this case alone. Since this is a case of first impression, we must ignore factor (12).

On balance, the most significant factors here would appear to be factors (1) excessive fees, (5) a customary hourly rate of no more than $75.00, (6) a fixed fee of $50.00 per hour subject to a contingency of $50.00 per hour which technically did not apply to the salary increase issue since it was not decided under the Civil Rights Act of 1964 (as amended), and (8) the limited amount of damages here - less than $1,000. We also note that counsel assumed little, if any, risk here since he was guaranteed a minimum fee of $50.00 per hour for <u>each</u> hour expended, irrespective of the number of hours approved by this body or a court of law. Weighing these factors against the public interest to be served by the award of attorney's fees in personnel cases, we have determined that the customary hourly rate of $75.00 is not justified here. Indeed, as we read the retainer letter between Petitioner and counsel, Petitioner is only obligated to compensate counsel at the rate of $50.00 per hour on the issue before us.

Accordingly, we have concluded that $50.00 per hour is the appropriate rate in this case. Applying the Lindy line of cases recognized by the MSPB in Kling v. Department of Justice, supra, multiplying the approved billable hours of 78.25 times $50.00 per hour produces a total fee of $3,912.50, plus $24.00 for expenses.

One issue remains: Is Petitioner's counsel entitled to a bonus multiplier of 60%? In answer to this question we reiterate a quotation from Kling, supra:

"In this regard, we note that the purpose of § 7701(g)(1) is to assure that legal expense is not a barrier to the representation of employees and applicants for employment who have just cause for appeal. Accordingly, a public policy "bonus multiplier" for counsel is not justified in a Board award of attorney fees in an employee appeals case. It may nevertheless be appropriate when counsel's compensation is contingent on success, to adjust the award upward to compensate for the risk the attorney is accepting of not being paid at all."

As noted earlier, Petitioner's counsel did not accept the risk of not being paid at all, merely of being paid at $50.00 per hour as opposed to $100.00 per hour if his client did not substantially prevail within the meaning of the Civil Rights Act of 1964, as amended. Thus, counsel for Petitioner is not entitled to a bonus multiplier here.

Decision

The Petitioner's request for the award of attorney's fees in the amount of $28,557.45 is denied. However, for the reasons set forth in the preceding Analysis, Petitioner is awarded attorney's fees in the amount of $3,912.50, plus $24.00 in out-of-pocket expenses. This is the final decision of the Board on Petitioner's request for attorney's fees pursuant to section 28.21(m) of the Board's regulations.